

INTERSTATE COMMERCE COMMISSION 04/12/96

FINANCE DOCKET # 32760

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1 We'll get into that.

2 MR. LIVINGSTON: I'm not sure there's a
3 dispute on that, but let's put Dow behind us so they
4 can --

5 MR. McBRIDE: Could we just ask Mr.
6 Livingston to identify what he says is only of
7 interest to Conrail, just in case the rest of us do
8 care. If I do, I'll stay. If I don't care, I'll
9 leave.

10 MR. LIVINGSTON: The issues that we would
11 be arguing about are what's called studies of SP
12 financial condition which is at the bottom of page 8.
13 And then on the very last page of that appendix,
14 there's a list of interrogatories and some document
15 requests and they all involve Conrail except one for
16 Dow and two for Union Carbide and we've got the Dow
17 ones settled.

18 MR. McBRIDE: So all your WSC issues are
19 behind us?

20 JUDGE NELSON: That's the one you think
21 you can settle?

22 MR. LIVINGSTON: Dow. Do you think we

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1 need to put that on the record or just enough to say
2 it's so.

3 MR. DiMICHAEL: I've given Mr. Norton --

4 MR. NORTON: For the record, in response
5 to document request 55 to Dow, the second set of
6 interrogatories and documents, we can stipulate that
7 Dow has produced information relating to the
8 production volume of polyethylene at its Freeport and
9 Plaquemine plants, (Dow does not produce polypropylene
10 at Freeport or Placquemine plants) as well as the
11 percent of capacity being utilized in 1995.

12 MR. LIVINGSTON: That's the agreement and
13 that dispute therefore with Dow is resolved.

14 The only matter and I think somebody
15 mentioned a letter from Mr. Konschnik to Your Honor.

16 JUDGE NELSON: We'll get to that.

17 MR. LIVINGSTON: Okay, from our point of
18 view that's -- we intend comply with that letter. WE
19 don't have a dispute on that with anybody.

20 JUDGE NELSON: That's important, that letter.
21 He wanted to talk to me about it and I suggested he
22 put it in writing so -- why don't we just break

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1 briefly for 20 minutes and reconvene at 1 o'clock?

2 (Whereupon, at 12:45 p.m., the discovery
3 conference was recessed, to reconvene at 1:00 p.m.,
4 Friday, April 12, 1996.)
5
6
7
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10
11

12 AFTERNOON SESSION

13 1:20 p.m.

14 MR. MCBRIDE: Can I just clear up one
15 matter? I did speak to my client at the break and I
16 can confirm, based on the information provided to me
17 by my client that the only financial contributions to
18 Western Shippers Coalition have been from its members,
19 including Utah Railway, while it was a member.

20 JUDGE NELSON: Mr. Estes, have you had a
21 chance to help us out?

22 MR. ESTES: Well, I tried, Your Honor. I

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1 did determine that contrary to what I represented to
2 you this morning that no party to this proceeding has
3 contributed any money to the Coalition. We have sent
4 out 137 invoices to members and another 61 will be
5 going out Monday, but unfortunately my bookkeeper
6 won't be in until Monday morning, so if you want a
7 more precise cash flow trace, I'll have to wait until
8 then.

9 JUDGE NELSON: I think for now that's a
10 good, voluntary disclosure and anything more that you
11 may want to give voluntarily you do so and anything
12 they want to chase after they can then bring on before
13 me. But if we proceed in that spirit, we can avoid
14 the need for orders or thrashing out difficult
15 constitutional questions.

16 Now this matter with Ms. Nunn and the
17 computerized materials, we have scheduled for Tuesday
18 at 8:30 a.m. I want to be notified if it is not
19 necessary, so I'll leave that with Mr. Mullins. If I
20 don't hear anything from you by close of business
21 Monday, then we'll be ready to go at 8:30 too.

22 All right, what next is left?

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1 MR. LIVINGSTON: Okay, there are some
2 requests involving Conrail and Union Carbide and then
3 there's a letter from Mr. Konschnik. Those are the
4 remaining matters.

5 JUDGE NELSON: Mr. --

6 MR. LIVINGSTON: Union Carbide is probably
7 the smallest piece of that puzzle.

8 JUDGE NELSON: Mr. Dowd made a suggestion
9 about the Konschnik business and there's a letter in
10 my office from someone else who said they like that
11 suggestion and I forgot to bring it down with me.
12 Does anyone remember who it is?

13 MR. MULLINS: No, Your Honor, but I have
14 had a conversation with mr. Konschnik as well, so I
15 can shed some light on that subject as well.

16 JUDGE NELSON: I could go get that letter
17 if it's important. But it's a person say "me, too" in
18 terms of relative burdens and so forth.

19 MR. MULLINS: Do you want me to address
20 that issue right now?

21 JUDGE NELSON: Do you want to deal with
22 that right now?

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1 MR. LIVINGSTON: I'm not sure there is an
2 issue. We intend to comply with his desires in our
3 filings.

4 JUDGE NELSON: Well, his desire was that
5 when you make filings that refer to the transcript
6 that you reproduce the page of the transcript you're
7 talking about.

8 MR. LIVINGSTON: We intend to do that.

9 JUDGE NELSON: Now then Mr. Dowd said
10 that's very expensive to have to do that on
11 everybody's and he made a suggestion that we just do
12 it on a limited number of copies and give it to the
13 Board.

14 That seemed to me to be a solution.
15 Anything wrong with that?

16 I'm going to order that then so that
17 parties in their submissions referring to pages of the
18 depositions will include, reproduce, some version like
19 an appendix, copies of those pages, at least what, Mr.
20 Dowd has suggested five copies. At least five copies
21 that are filed with the Board, so you may, if you
22 wish, put them in everybody's copy.

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1 Any questions about that?

2 MR. MULLINS: That's fine, Your Honor.

3 MS. FELASCO: Your Honor, the Department
4 of Justice will do whatever they can to accommodate
5 the Board. Our concern is that on June 3rd when we
6 have our brief file that we can still say to other
7 persons in the record that are not included and that
8 haven't been designated or however you want to
9 characterize it --

10 JUDGE NELSON: You mean something in the
11 file before we made this rule?

12 MS. FELASCO: No, in our filing, in our
13 brief that's being filed on June 3rd we can still say
14 to portions in the record that have previously been
15 attached to other testimonies?

16 JUDGE NELSON: We're talking about
17 deposition transcripts.

18 MS. FELASCO: Yes, Your Honor.

19 JUDGE NELSON: So far as I understand that
20 was all that Mr. Konschnik wrote about.

21 MS. FELASCO: So everything is still
22 included in the record? That's what I want to make

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1 clear, that all depositions and exhibits are
2 considered in the record and we can still cite to
3 them.

4 JUDGE NELSON: Yes, but you've got to
5 reproduce the pages.

6 MS. FELASCO: On June 3rd?

7 JUDGE NELSON: Yes.

8 MS. FELASCO: Okay.

9 JUDGE NELSON: Either as an appendix or a
10 separate volume or something of that nature.

11 MS. FELASCO: That's fine, Your Honor. I
12 just had to make sure we weren't precluded from citing
13 to other portions of the --

14 JUDGE NELSON: I don't think you're
15 precluded from citing to anything. That is not the
16 problem. The problem is that here are these people
17 sitting there with a small employee staff and a low
18 budget and they can't spend their time running around
19 to try to find the deposition of Krebs, page 42.

20 MS. FELASCO: Right.

21 JUDGE NELSON: They can take two hours to
22 find it. They want you to reproduce it to that, the

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1 pages of deposition transcript you're referring to.

2 MS. FELASCO: Okay, and as far as our
3 filing that's due today, Your Honor, we will probably
4 be producing that as a supplement since we did not
5 know in advance.

6 JUDGE NELSON: You can't be held to
7 standards that are announced after the fact.

8 MS. FELASCO: Thank you very much.

9 JUDGE NELSON: It's not usually the
10 American system. Yes sir?

11 MR. HUT: I think that probably answers my
12 question, Your Honor, which was the ruling which was
13 based on Mr. Konschnik's suggestion is prospective of
14 those filing now or retrospective --

15 JUDGE NELSON: I'm going to make it
16 prospective only and if there are problems with that,
17 we'll probably talk with Mr. Konschnik about it.

18 (Laughter.)

19 MR. BERCOVICI: So, Your Honor, we don't
20 have to file and go and supplement?

21 JUDGE NELSON: I don't think so. Did
22 anybody get the feeling that he wants that, he wants

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1 you to go back retroactively?

2 MR. MULLINS: Yes, he does because this is
3 the problem. The staff and indeed the former staff,
4 I can tell you the problem, is that there's only one
5 copy of the transcript over there right now and they
6 --

7 JUDGE NELSON: The deposition transcript?

8 MR. MULLINS: The deposition transcript.
9 They have 10 staffers working on the case and they're
10 each working on different parts of the case and they
11 can't all go to --

12 JUDGE NELSON: So I want to reconsider
13 whether it should be prospective. What problems have
14 we got if we make it retroactive?

15 MR. MULLINS: The only problem there is
16 how many people we would have to serve on. If Your
17 Honor says five copies and we only have to serve it on
18 the Board, I think that's all that's required.

19 JUDGE NELSON: I'm taking Mr. Dowd's
20 suggestion, five copies.

21 MR. MULLINS: On the Board. I think that
22 would be completely sufficient and satisfy their

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1 concern. I know they also have a concern about Joe Q.
2 Smith out in Kansas and if he's reading our filing and
3 cites to some deposition in the transcript, he doesn't
4 have that, but we could maybe -- the answer is he can
5 hire a service to go get copies from the public record
6 over at the STB.

7 MR. McBRIDE: Or call the parties'
8 representative and ask them for a copy. Nobody asked
9 me for that.

10 JUDGE NELSON: I didn't give out -- I had
11 a very brief conversation with Ms. Farr and Mr.
12 Konschnik on the line and that was when I said put it
13 in writing and we'll talk with the parties. It was
14 more of there are problems here getting access.

15 MR. MULLINS: Yes, that is certainly 90
16 percent of their concern.

17 JUDGE NELSON: So let's say that we go
18 back to when, to the filings of the 29th?

19 MR. BERCOVICI: That would be the date,
20 Your Honor.

21 JUDGE NELSON: Retroactively to the 29th
22 and make a supplemental filing in which you reproduced

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1 copies of the deposition transcript pages cited and
2 you file five of those in the Surface Transportation
3 Board, you need not file them with anybody else
4 because they all know where it is.

5 MR. MULLINS: Fine.

6 JUDGE NELSON: Anything else on Mr.
7 Konschnik's problems?

8 MR. STREETER: Judge Nelson, are you going
9 to send out an order to that so that everybody that's
10 not here today would be served a copy of that?

11 JUDGE NELSON: I suppose I should. The
12 problems with this --

13 MR. LIVINGSTON: This doesn't apply to us.

14 JUDGE NELSON: But you did it anyway?

15 MR. LIVINGSTON: No, we didn't file on the
16 29th.

17 JUDGE NELSON: We're making it effective
18 the 29th. You don't have to go back to the beginning
19 of the case.

20 MR. MULLINS: They're filing April --

21 MR. LIVINGSTON: We filed in April some
22 time.

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1 JUDGE NELSON: The first filing wouldn't
2 have picked up any depositions.

3 MR. LIVINGSTON: Right, right. It
4 wouldn't have affected the original applications. So
5 we intend to comply with what Mr. Konschnik wants on
6 the day when we make our filing. That's our plan.

7 It does seem to me it would be useful if
8 people are putting these in some sort of supplemental
9 booklet or of the kind we gave Your Honor this morning
10 and if there's a table of contents that it be served
11 on the restricted service list.

12 MR. MULLINS: Well, we would object to
13 service on the entire restricted service list.

14 JUDGE NELSON: That sounds like an
15 expensive proposition.

16 MR. LIVINGSTON: A few pages.

17 JUDGE NELSON: I see no need for that.
18 You've all got copies and have access. I'm not going
19 to do that.

20 Mr. Streeter asked if I would enter an
21 order. I will do that. Does somebody want to prepare
22 one or any problems? Suppose I talk to Mr. Konschnik.

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1 That may be even better. Any problems in that
2 conversation?

3 I'll work up an order and I'll tell him
4 what we've done and if it suits him, I'll issue it.
5 Then if there are troubles we can hear from -- I'll
6 recite any, if it's after the consultation.

7 All right, what's next in the discovery
8 business?

9 MR. LIVINGSTON: There are a couple of
10 items for Union Carbide and perhaps we can do those
11 next.

12 Do you want to address these, Jerry? I
13 think these would be item 16 in the booklet --

14 JUDGE NELSON: You're in the appendix now?

15 MR. LIVINGSTON: Yes.

16 JUDGE NELSON: 16. And it's which
17 interrogatory?

18 MR. LIVINGSTON: 30.

19 JUDGE NELSON: 30.

20 MR. NORTON: At the bottom of the page.

21 JUDGE NELSON: I see it. So this is a
22 request for certain documents found in the offices at

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1 the level of vice president or higher, pertains to
2 subjects discussed in the files?

3 MR. NORTON: That's correct.

4 JUDGE NELSON: What's the problem with
5 this?

6 MR. BERCOVICI: I disagree, Your Honor.
7 This is not related to subjects discussed in our
8 filing. Our filing for Union Carbide is no more than
9 50 pages long, including verified statements and
10 argument. We addressed one very narrow situation,
11 Your Honor, and that is a single Union Carbide
12 Corporation --

13 JUDGE NELSON: Oh, I see your problem.
14 The March 25th filing refers to everyone --

15 MR. BERCOVICI: Oh no.

16 JUDGE NELSON: We construe that as meaning
17 yours.

18 MR. BERCOVICI: None of the information
19 that they have requested here, let me state first,
20 that we have given them hundreds and hundreds of pages
21 of documents. Our problem is that Union Carbide is a
22 Seadrift, Texas plant that is served exclusively by

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1 Union Pacific. We are about ten miles from an SP line
2 and we've got to build that opportunity. We've
3 discussed that with you in the prior discovery trying
4 to get documents from applicants related specifically
5 to that build out, but it's the only thing we've
6 addressed in the filing. The filing said if the
7 merger is granted, as proposed, but then we asked the
8 Surface Transportation Board to condition that on
9 preserving our right to competitive service that we're
10 losing by virtue of the merger to two carriers and the
11 loss of opportunity for a build out to a second
12 carrier, i.e., preserve in some fashion the right of
13 BN --

14 JUDGE NELSON: What does that have to do
15 with interrogatory 30? I'm lost here.

16 MR. BERCOVICI: The question is what does
17 interrogatory 30 have to do with Union Carbide's
18 position here. We're asking for transport pricing or
19 competition for chemicals. Union Carbide has, I
20 think, about five plants in the U.S. and maybe more.
21 They make hundreds and hundreds of chemicals at the
22 various plants and it's got nothing to do with --

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1 JUDGE NELSON: Oh, I see --

2 MR. BERCOVICI: With the question of a
3 lost build out --

4 JUDGE NELSON: If the filings discuss
5 chemicals, you want everything in every vice
6 president's office to discuss the transportation of
7 chemicals?

8 MR. BERCOVICI: Any kind of chemical.

9 JUDGE NELSON: Let's see if we can't focus
10 this a little better. It's susceptible to being very
11 broadly read.

12 MR. NORTON: Your Honor, there are --

13 JUDGE NELSON: Maybe you can work out what
14 you really want.

15 MR. NORTON: The attempt was to say that
16 if you discuss in your filings one of these subjects,
17 then we wanted studies, reports or analyses found --

18 JUDGE NELSON: It's clear they're a
19 chemical company, along other things. Is that right?

20 MR. BERCOVICI: We're a chemical company,
21 yes sir.

22 JUDGE NELSON: And every piece of paper in

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1 their files deals with or thousands of pieces deals
2 with transportation of chemicals handling such
3 commodities and of course they discuss chemicals in
4 their filings because that's what they do, so that in
5 that sense the interrogatory is overly broad.

6 I think the problem is one of
7 draftsmanship. I don't think you meant it to be that.

8 MR. NORTON: Well, Your Honor, it is
9 focused on studies, analyses and reports, not just
10 every document and that is a significant narrowing and
11 I would propose there are a couple of additional ways
12 I think we could narrow it that would be useful. One
13 is that the second line where it says -- I'm sorry,
14 just before the (a) where it says discussing, we would
15 be willing to limit that to something like "about" or
16 "on the subject of" rather than discussing because
17 that would, I think, help narrow the range of search
18 and make it a much more identifiable range of reports.

19 In addition, there is starting on the end
20 of the fourth line, there's a clause about "or other
21 files where such materials would more likely be
22 found." That was meant to provide a limitation, not

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1 a broadening of the request and if that is not helpful
2 we would be willing to limit it to the vice presidents
3 and above as the rest of it would provide.

4 We have -- with those changes, I think we
5 have worked this out with Conrail so that there's no
6 longer a dispute about this particular request as to
7 Conrail. And if they don't -- if their filings do not
8 discuss the other items, then they don't have to
9 respond. It's only if they do discuss those subjects.

10 MR. BERCOVICI: What do you mean discuss?
11 Discuss as background or discuss as an element of the
12 claim for relief? If it's an element for the claim
13 for relief, it's much different than --

14 MR. NORTON: I think the latter is what
15 we're really talking about.

16 MR. BERCOVICI: So if you're saying it's
17 an element of the claim for relief? And is the
18 competition referred to in (a) is that competition
19 involving Union Pacific and Southern Pacific?

20 MR. NORTON: Competition for chemicals and
21 petrochemicals.

22 MR. BERCOVICI: Is that all chemicals and

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1 petrochemicals? Whatever plant that they may be
2 produced in? Anywhere in the world at any of
3 Carbide's plants?

4 JUDGE NELSON: Can you confer with Mr.
5 Norton and try to work something out here? We don't
6 need to take up time with this. This is the kind of
7 thing lawyers should have done in the first place.

8 MR. BERCOVICI: We tried, but we couldn't
9 understand and they kept searching around trying to
10 root into our files and --

11 JUDGE NELSON: Obviously by way of
12 guidelines you filed and have taken some position in
13 this case and you're open to discovery in that
14 position.

15 MR. BERCOVICI: On that position?

16 JUDGE NELSON: Very clearly, the broadest
17 possible discovery on that position. Secondly, from
18 the viewpoint of the applicants this interrogatory can
19 be read as overly broad and I would expect you to
20 narrow its focus somehow or other and I'm going to see
21 if you can't work that out, either right now or during
22 a break.

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1 What's the next item?

2 MR. LIVINGSTON: There's a Union Carbide
3 item which is No. 19 in the booklet which is
4 interrogatory 55 or document request 55, I guess it
5 is.

6 MR. NORTON: Your Honor, let me suggest on
7 that one.

8 JUDGE NELSON: You have the same language.

9 MR. BERCOVICI: Guided by the comments on
10 No. 30, that we have further discussions with them on
11 that one.

12 MR. BERCOVICI: Does this also apply to
13 what you agree with Dow Chemical this morning with
14 regard to 55?

15 MR. NORTON: Something along those lines
16 might be workable, yes.

17 We have to be tailored to your
18 circumstances.

19 JUDGE NELSON: What else do we have?

20 MR. LIVINGSTON: That's it for Union
21 Carbide Company.

22 MR. BERCOVICI: Thank you, Your Honor.

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1 MR. KILLORY: Just so the record is clear,
2 since we reached agreement and you made reference to
3 our agreement on 30 and I think it is on the table, we
4 were both very tired late last night, B and C was also
5 deleted as well.

6 MR. NORTON: Absolutely.

7 JUDGE NELSON: Other disputes?

8 MR. LIVINGSTON: Yes, now the remainder
9 are Conrail disputes.

10 JUDGE NELSON: We'll deal with Conrail
11 now.

12 MR. McBRIDE: Can I just inquire, is that
13 then it?

14 MR. LIVINGSTON: That's it as far as I'm
15 concerned. As far as other parties, I don't know of
16 anything coming out that would involve other parties
17 other than Conrail and Carbide.

18 JUDGE NELSON: Anyone else that wants to
19 go is free to go.

20 MR. McBRIDE: Great, I just always abide
21 by your ruling --

22 JUDGE NELSON: You never know what

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1 happens, but you go with your eyes opened.

2 MR. LUBEL: Your Honor, could I just make
3 an announcement before some leave on Ms. Nell Nunn?

4 JUDGE NELSON: Good.

5 MR. LUBEL: I have confirmed that she is
6 on vacation, but can be reached in an emergency and we
7 have treated this as an emergency so we are getting in
8 touch with her and we'll hopefully be able to work
9 something out with the applicants. My office says
10 though that when we earlier tried to schedule the
11 deposition for early next week, the middle of next
12 week, they had some commitment then so I'm not sure if
13 they're available for Tuesday morning, but we'll take
14 that as an incentive to try to work something out.

15 JUDGE NELSON: And if you can't, find out
16 her nearest first availability.

17 MR. LUBEL: Right.

18 JUDGE NELSON: It sounded to me like a
19 problem that could be solved. The real issue may have
20 been the protections to attach the attorney.

21 MR. LUBEL: She's going to have to weigh
22 in on that. She's got her own company --

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1 JUDGE NELSON: She also has the problems
2 that she's in a case, she plays by the rules and if
3 the rules are that you get certain treatment for
4 highly confidential materials and she doesn't like
5 that treatment, maybe she doesn't belong in the
6 ballgame. She'll have to face that. And you, more
7 importantly will have to face that. She's been paid
8 anyway. You want her material.

9 MR. LIVINGSTON: With that, Your Honor,
10 this is -- the next item is on --

11 JUDGE NELSON: You might tell her that,
12 that she can't expect to come into a case and not have
13 to play by the same rules that other people are
14 playing on with secrets that are just as important to
15 them.

16 We have fashion special protections and
17 I'd be willing to hear suggestions.

18 MR. LUBEL: As Judge Ensfield, an ICC
19 practitioner for many years said to me one time if you
20 accept the King's shilling, you have to march in his
21 Army.

22 JUDGE NELSON: I'm sure she'll get the

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1 message.

2 (Laughter.)

3 Where are we now? Conrail.

4 MR. LIVINGSTON: Conrail, and there are
5 several items and the first item is described on page
6 8 of the letter and is item 11 of the booklet is not
7 only item 11, the first one is also a document request
8 no. 11.

9 In the course of the Conrail filings on
10 March 29th which were quite extensive, Conrail made
11 arguments, in fact, I have some of them here about the
12 financial resources of the Southern Pacific, one of
13 the headings in one of their papers, CR-22 was SP has
14 the financial resources to continue to improve its
15 service and reduce its cost.

16 JUDGE NELSON: You're quoting from what?

17 MR. LIVINGSTON: I'm quoting from a
18 Conrail -- that is not my statement. That is a
19 Conrail statement, quoting from CR-22 which is the
20 numerical document or indicator of the document, page
21 49.

22 JUDGE NELSON: That's a filing made in

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1 this case?

2 MR. LIVINGSTON: Correct, and had a
3 verified statement by a man named Jerome Haas who is
4 a professor of finance and business strategy at
5 Cornell to present their evidence on that subject. So
6 it was an important part of their filing.

7 JUDGE NELSON: What is their overall
8 position? Again, I'll ask --

9 MR. KILLORY: Very similar to what was
10 articulated by KCS, Your Honor. It seeks divestiture
11 of that line going from the Houston area towards St.
12 Louis lines. It would not, I might add, in favor of
13 Conrail, just the divestiture and Conrail, like
14 anybody else, might come in and made a bid.

15 JUDGE NELSON: So there would be an
16 opportunity for different railroads to answer their
17 competitors?

18 MR. KILLORY: that's right.

19 MR. LIVINGSTON: We would characterize it
20 as being in effect opposition and Conrail is not
21 disinterested here. They made it clear that they want
22 to buy what's called the Cottonbelt line which is the

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1 Southern Pacific line running from St. Louis to El
2 Paso. And they've indeed made an offer to buy.

3 Given their position, they are taking on
4 SP finances which is one of the issues in the case, we
5 put an interrogatory to them which is here on this
6 interrogatory or this document request No. 11 which
7 says if you to produce all reports, studies or
8 analyses found in the files, vice president or above,
9 discussing the financial position or prospects of SP,
10 directly relevant goes right to an issue that they
11 addressed in their filings.

12 Conrail objected, as you can see at the
13 bottom of the page to the extent and I'm quoting them,
14 "to the extent that it seeks information relating to
15 Conrail's future plan."

16 That suggests to us that they have
17 documents which evaluated their own internal
18 evaluation, not Professor Haas' evaluation, not their
19 lawyer's evaluation, but their own internal
20 evaluation, the value of SP which is in a document
21 which relates to future plans and on that ground
22 they're not giving us the document.

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1 I don't think our position is that that's
2 not a justification for refusing to provide their own
3 internal evaluation.

4 JUDGE NELSON: They had said SP is in
5 pretty good shape?

6 MR. LIVINGSTON: That's what --

7 JUDGE NELSON: Let me see that.

8 MR. LIVINGSTON: I can give you this
9 excerpt.

10 JUDGE NELSON: What is CR-22?

11 MR. KILLORY: That's our filing, Your
12 Honor.

13 JUDGE NELSON: A number --

14 MR. HUT: It's probably CR-21.

15 JUDGE NELSON: I see.

16 MR. HUT: I have a copy here if you'd like
17 to see it, Your Honor.

18 JUDGE NELSON: So what is this in the
19 context of? SP could live alone?

20 MR. LIVINGSTON: That is part of the
21 argument.

22 JUDGE NELSON: It doesn't need this

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1 merger?

2 MR. LIVINGSTON: But it's not a failing
3 railroad.

4 JUDGE NELSON: Right.

5 MR. HUT: Troubled.

6 JUDGE NELSON: So we go into Haas' study.

7 MR. LIVINGSTON: Right, he's an outsider.

8 JUDGE NELSON: And Haas' shows that
9 there's some health in the railroad.

10 MR. LIVINGSTON: He gave testimony on the
11 subject.

12 JUDGE NELSON: They say he does.

13 MR. LIVINGSTON: He is their witness, I
14 believe on this subject.

15 JUDGE NELSON: His study essentially
16 corroborates their theory?

17 MR. LIVINGSTON: Yes.

18 JUDGE NELSON: That SP isn't so bad
19 financially.

20 MR. LIVINGSTON: Now this company,
21 Conrail, indeed made an offer for a large hunk of the
22 SP, the Cottonbelt hunk and we have asked them for

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1 their own internal evaluations of the financial
2 position and prospects of SP. That's what this
3 document request is.

4 JUDGE NELSON: You might show that the
5 picture they believe is not so rosy as Haas says it is
6 when it comes down to making the actual offer. Don't
7 you know what they offer?

8 MR. LIVINGSTON: Yes.

9 MR. KILLORY: Yes, in the filing.

10 JUDGE NELSON: Then that doesn't tell us
11 internally what they evaluated the line as being.

12 MR. LIVINGSTON: There's no reason in the
13 world, it's not an offer being made on the New York
14 Stock Exchange. This is an offer made as part of
15 their strategy --

16 JUDGE NELSON: Well, if the offer was an
17 opening bid to buy a piece of the Southern Pacific,
18 it's not all of it, I take it. It's a piece of it.

19 MR. LIVINGSTON: That's correct.

20 JUDGE NELSON: Then that would have
21 started negotiations back and forth.

22 MR. LIVINGSTON: There are no

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1 negotiations.

2 JUDGE NELSON: But you didn't.

3 MR. LIVINGSTON: There are no
4 negotiations.

5 JUDGE NELSON: Nothing happened.

6 MR. KILLORY: Your Honor, the offer is
7 still on the table.

8 JUDGE NELSON: The offer is on the table
9 and that offer is known to you. I'm still not clear
10 what else it is you need.

11 MR. LIVINGSTON: There are no
12 negotiations. Conrail is regarded as an opponent to
13 this merger buyout of the applicants. They have made
14 an offer that is not being treated as something that
15 is being negotiated.

16 JUDGE NELSON: How much money is --

17 MR. LIVINGSTON: I have no idea.

18 MR. KILLORY: \$1.5 billion, Your Honor.

19 JUDGE NELSON: \$1.5 billion. That is,
20 Conrail has offered to buy this part of the SP
21 property for \$1.5 billion. SP has turned it down.

22 MR. KILLORY: UP has turned it down. It

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1 was an offer to UP.

2 JUDGE NELSON: I thought it was SP.

3 MR. KILLORY: They offered to UP to buy
4 certain lines, certain SP lines.

5 MR. HUT: May I speak to this a moment,
6 Your Honor? Perhaps I can help.

7 JUDGE NELSON: I'm a little lost.

8 MR. HUT: After the merger was announced

9 --

10 JUDGE NELSON: Yes.

11 MR. HUT: And so if consummated, UP would
12 own these lines, Conrail went to UP and said --

13 JUDGE NELSON: I see. It's a post merger.

14 MR. HUT: It's successful and it's
15 consummated and we believe as a requirement to meet
16 some competitive concerns, you should divest these
17 lines because we're a willing purchaser and we'll
18 offer \$1.5 billion.

19 JUDGE NELSON: They're not making that
20 offer now, are they?

21 MR. KILLORY: It's on the table. It's not
22 part --

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1 JUDGE NELSON: It's wholly contingent on
2 the merger?

3 MR. KILLORY: That's right. But it's out
4 there.

5 JUDGE NELSON: Why don't you just buy that
6 piece of the railroad right there?

7 MR. KILLORY: Directly from SP?

8 JUDGE NELSON: Yes sir.

9 MR. KILLORY: It's not a decision I was
10 consulted on, Your Honor.

11 MR. HUT: I think I have a contract to
12 sell to you people.

13 MR. LIVINGSTON: I believe that's right.
14 I don't believe it's on sale at the moment, Your
15 Honor, and this offer is not being --

16 JUDGE NELSON: Now is it your theory that
17 that \$1.5 is a no go?

18 MR. LIVINGSTON: I have no idea what it
19 is. I do know that they put in a professor's
20 testimony making their arguments in this case about SP
21 value.

22 JUDGE NELSON: How did the \$1.5 become an

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1 issue in the case.

2 MR. LIVINGSTON: 1.5 is not an issue, I
3 don't believe. What we are trying to get here in
4 discovery is what are their own undisclosed internal
5 assessments of the value of SP. And then we will see
6 how they square up with Mr. Haas' estimates.

7 JUDGE NELSON: The question is you may
8 have in your files material that are inconsistent with
9 Haas' conclusions.

10 MR. KILLORY: I can respond to that.

11 JUDGE NELSON: What's wrong with that?

12 MR. KILLORY: First of all, Your Honor,
13 this discussion shouldn't be read just in the context
14 of 11. They have properly grouped 11 document
15 requests, 17 and 27. If you look at the 17 you'll see
16 really what it is they're going for here which says
17 directly point blank, give us the back up to your
18 offer and an offer that Your Honor has correctly
19 pointed out is not part of our filing. It's made
20 mention in our filing, but we're not requesting
21 divestiture of the two lines. This is a separate
22 business negotiation offer that's on the table and 17

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1 gets to the heart of it and says well give me -- 27
2 says well give me what the investment bank has advised
3 you. Give me the underpinnings for your offer. Well,
4 clearly that is a well established precedent that you
5 cannot get the underlining documents for an offer that
6 is on the table because to give that away gives away
7 all our future negotiating positions and I might add
8 that Mr. Livingston has mischaracterized what we have
9 given.

10 Mr. Haas testified we gave a whole sheaf
11 of materials that -- everything that he looked at,
12 everything he considered relating to SP. In fact,
13 today we're handing over more documents from Conrail
14 files that show everything that we consider about SP's
15 financials other than this narrowly drawn area which
16 is the materials prepared by the investment bankers
17 and others that went into consideration of what price
18 do we offer --

19 JUDGE NELSON: What if all that impeaches
20 Haas?

21 MR. KILLORY: There's a privilege that
22 protects because if we gave that away, it's as though

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1 you said to UP, part of your proposal here has to do
2 with what you're going to do with labor costs after
3 you require this thing. While you put that in play,
4 give us the limits of your negotiation position with
5 unions.

6 JUDGE NELSON: It seems to me you get into
7 a case in which you made SP's financial condition an
8 issue, why --

9 MR. KILLORY: All we said about the SP
10 financial condition is that we think it's not a
11 failing company. A \$1.5 billion offer on its face
12 shows that we believe that to be the case. It's got
13 value. But to use that as an excuse to try to
14 leverage open to get a negotiation advantage down the
15 line to be able to say we know what your investment
16 bankers told you about what price you might offer in
17 the future, that's all we're protecting. We've giving
18 everything else, any financial or other analysis.

19 JUDGE NELSON: In other words, you're
20 concerned here that if there is a merger and your
21 offer is on the table, then they won't know how to
22 deal with it so it's --

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1 MR. KILLORY: It's private book. They
2 know exactly where we might go in negotiations.

3 There's well established case law. We
4 think it's a good offer and they ought to consider it.

5 There's well established case law from the
6 corporate acquisition context that says exactly that,
7 that there's a privilege or immunity that protects
8 that sort of information in situations where it's much
9 more probative, much more relevant to the issues
10 involved in the litigation than it is here. We've
11 given them a whole sheaf of documents on everything
12 we've got on SP other than this very narrow piece that
13 is, when we sat down with our investment bankers and
14 they said gee, here's what you might price it at. I
15 don't know exactly what it says but here's where you
16 might go. These things are always sort of set up --

17 JUDGE NELSON: Don't you think the Board
18 would like to know what the investment bankers thought
19 that the SP was worth?

20 MR. KILLORY: I don't think they have a
21 right to inquire about it because we're not requesting
22 that they sell it to us. This is not a matter before

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1 the Board. What's before the Board is simply a
2 divestiture proposal and it doesn't say "sell it to
3 us." We're not requesting them to sell it.

4 JUDGE NELSON: The whole issue would be
5 SP's condition --

6 MR. KILLORY: And that's what we gave
7 them. Everything related to that wasn't in this
8 narrow piece -- it's just like the attorney-client
9 privilege type --

10 JUDGE NELSON: I'm still struggling with
11 it. You opened up the door on SP condition. You
12 hired Haas.

13 MR. KILLORY: And we've given them
14 everything.

15 JUDGE NELSON: Gave them a bunch of stuff
16 and you're picking and choosing.

17 MR. KILLORY: No we're not.

18 JUDGE NELSON: Now you're holding on to
19 something that does deal with it.

20 MR. KILLORY: That's not true, Your Honor.
21 We have given them everything we have analyzed as SP's
22 financial condition, including everything that Haas

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1 did look at including studies that we made, here are
2 the rail yards, how can we improve these rail yards?
3 We've given everything in a very narrowly defined box
4 which says this is what you might be able to offer,
5 this is where you might go with it. This is how we
6 piece it together. To give that away is simply
7 absolutely hand over a corporate negotiated advantage.
8 It's a central core set of documents. I can give you
9 the cases, Your Honor, if you'd like --

10 JUDGE NELSON: It allows every railroad in
11 a merger case to say what it wants about the financial
12 condition of the applicant while holding its own
13 papers in the vault --

14 MR. KILLORY: We're not holding any papers
15 in the vault other than one narrow universe that
16 supports the offer of \$1.5 billion which they have
17 that \$1.5 billion. It tells them what we value it at.
18 To say we want to see what the bankers told you in
19 terms of how much to give in negotiations is
20 preposterous.

21 JUDGE NELSON: You want to keep that offer
22 out there, keep open the chance that you can buy this

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1 piece of property while with the arm telling the Board
2 what horrific shape the SP is in.

3 MR. KILLORY: Everything that relates to
4 that subject has been produced, Your Honor.

5 JUDGE NELSON: I am troubled about it.

6 MR. HUT: May I be heard, Your Honor? I
7 want to underscore Mr. Killory's last point. The
8 assessment of the SP's financial health to the extent
9 there are internal Conrail documents, to the extent
10 there are work papers that have been relied on by
11 Professor Haas, those have all been turned over.

12 Only narrow category that we seek a
13 protection for --

14 JUDGE NELSON: I understand is what some
15 bankers told you they thought the railroad was really
16 worth.

17 MR. KILLORY: No, that's not it.

18 MR. HUT: No, it is the inclusion of
19 values and ranges and identification of where the true
20 values are and if we give that out, we are giving them
21 a --

22 JUDGE NELSON: I understand that. You've

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1 got options for that. One is to withdraw the offer.
2 Two is to withdraw from the case. You want to stay in
3 there in the case and address for conditions. You
4 want to say that SP is in relatively healthy
5 condition. You want to keep an offer on the table.
6 You want all the balls here, but you don't want to
7 give up anything.

8 MR. HUT: A condition is not the sale to
9 Conrail, Your Honor. That's key. The condition
10 divestiture and the \$1.5 billion was articulated
11 simply to show the Board that there was a substantial
12 offer out there and it could have the confidence if a
13 divestiture were required, there would be serious
14 bidders.

15 JUDGE NELSON: There it is and you're
16 making an issue of the SP's financial condition, but
17 you're not turning over relevant papers.

18 MR. HUT: We've given them everything on
19 it except for a narrow category for which there is a
20 well-established --

21 JUDGE NELSON: This may be the most
22 persuasive stuff.

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1 MR. HUT: I believe that it is --

2 JUDGE NELSON: In the ordinary discovery,
3 there would be problems in producing that stuff you
4 had arguments, but your in here for the tribunal
5 seeking relief, submitting yourself to this.

6 MR. HUT: Not this relief. Not the relief
7 of a sale to Conrail.

8 JUDGE NELSON: You're in part saying the
9 SP is healthy and can withstand the relief we want.

10 MR. HUT: No.

11 MR. KILLORY: That's not what we're
12 saying.

13 JUDGE NELSON: Then why are you bringing
14 it up?

15 MR. HUT: SP is a very substantial
16 competitor. It's an aggressive --

17 JUDGE NELSON: Why don't you withdraw that
18 part of your submission.

19 MR. HUT: We've proved that that's
20 critical to show the potential anti-competitiveness of
21 the acquisition is, Your Honor. That doesn't have to
22 do with the --

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1 JUDGE NELSON: Health is only important
2 when viewed with a competitor?

3 MR. HUT: Exactly.

4 JUDGE NELSON: How important they are if
5 they get merged, then they get healthy?

6 MR. HUT: No.

7 JUDGE NELSON: And you lose the force of
8 the competitiveness.

9 But now when we want to look at what
10 they're really worth, they want to know what the
11 bankers said.

12 MR. HUT: That have suggested that SP's
13 continued existence is a nullity. It's
14 inconsequential. SP is so healthy/unhealthy, excuse
15 me, that there is a question every day whether they
16 can couple a single car to a locomotive.

17 We want to show --

18 JUDGE NELSON: Who is they?

19 MR. HUT: That's a characterization --

20 MR. LIVINGSTON: it's a caricature.

21 JUDGE NELSON: That also makes the
22 discovery relevant.

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1 MR. HUT: We agree that discovery in the
2 financial health of SP and the appraisal is relevant
3 and any studies that Conrail has done about that are
4 all that they had been supplied. It is this narrow
5 area for future plans and proposals that makes it in
6 all cases where it comes up in corporate litigation,
7 protected from disclosure. It is the basis that is
8 the foundation for the protection we seek here.

9 MR. KILLORY: I mean, Your Honor, for
10 example, a company makes an offer to buy another. I
11 mean they are voluntarily putting themselves in play
12 and a stake in an issue. The courts have said you are
13 not required to give away your future plans that --
14 you've got to give a lot of other things, but when it
15 goes to this very small core that hands over your
16 strategy to the other side, it makes the price of
17 admission, you can't participate.

18 JUDGE NELSON: I hear that.

19 MR. KILLORY: I have the case law. I'd be
20 happy to give it to you, Your Honor.

21 MR. LIVINGSTON: Your Honor, there are no
22 negotiations going on. This is an offer that was made

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1 --

2 JUDGE NELSON: Has SP rejected that offer?

3 MR. LIVINGSTON: UP. It's not been
4 accepted. It's been rejected. There are no
5 negotiations.

6 JUDGE NELSON: UP is rejected.

7 MR. KILLORY: We never knew that offer,
8 Your Honor.

9 JUDGE NELSON: All right, I've heard all
10 this and I'm going to order production of these
11 materials.

12 MR. KILLORY: Your Honor, because this
13 stuff is so sensitive and goes to the core, can we
14 request a stay so that we may have an opportunity to
15 seek an appeal?

16 JUDGE NELSON: You have the normal three
17 days that the -- two days that whatever it is. The
18 Commission has laid down procedure for this. Whatever
19 it is, take it.

20 MR. HUT: So that if we make an appeal,
21 that in essence stays the requirement to turn it over?

22 JUDGE NELSON: I don't know that. I have

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1 no control over interlocutory appeals.

2 MR. HUT: I'm just seeking clarification
3 on it, Your Honor. We obviously don't want to act in
4 contravention of an order.

5 JUDGE NELSON: I have no expertise on
6 interlocutory appeals. I don't even know what that
7 machinery is. I know there's a time limit for it.

8 MR. LIVINGSTON: Three days.

9 JUDGE NELSON: My view is you came in
10 here, made an issue of the financial condition of the
11 SP, have other materials that bear on that condition
12 which you can see to be relevant, but won't give them
13 up because you've got this alleged negotiation going
14 on.

15 The other side says there isn't a
16 negotiation. There is no offer, it's rejected.
17 You're in the position as far as I can see of coming
18 and making an issue of the SP financial condition,
19 seeking relief for railroads and by a device that
20 looks almost artificial in this context of insisting
21 an offer is on the table which the other side said
22 isn't, clothing certain documents for protection.

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1 My view is that you've gone too far, said
2 too many things, done too much to now take this
3 rejected offer and convert it to a shield to protect
4 evidence that seems to bear on what you think the SP
5 really is worth and I'm directing production on that
6 ground.

7 Take whatever interlocutory appeals you
8 want. Again, we always welcome the Board's guidance
9 on these issues.

10 MR. HUT: So long as the applicants --

11 JUDGE NELSON: What do we have to discuss?

12 MR. HUT: I want to try to clear this up.
13 I do want to operate within the four corners of the
14 rules and the law, so long as the applicants are not
15 going to be in here during the pendency of the appeal
16 until it's decided, urging sanctions for failure to
17 comply with an order, that's the point, that's the
18 protection that we want now.

19 JUDGE NELSON: Any thoughts on this
20 problem?

21 MR. LIVINGSTON: We've had appeals in this
22 case before. This has never come up. Frankly, I

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1 don't think it will come up here. I assume they'll
2 file their appeal on Monday. It will probably be
3 resolved by the end of the week.

4 JUDGE NELSON: Haven't then they been
5 pretty prompt in turning those appeals around?

6 MR. LIVINGSTON: Very prompt. This one is
7 narrow compared to some of the others. I would think
8 this one would be turned around quickly. I frankly
9 don't see --

10 JUDGE NELSON: My reading of the orders
11 shows me there's someone over there paying careful
12 attention.

13 MR. LIVINGSTON: I think they do process
14 these very quickly. If they file the appeal on
15 Monday, I wouldn't be surprised if we had an order by
16 Friday.

17 JUDGE NELSON: Let me just say this, Mr.
18 Hut, in view of the track record of the Board in
19 interlocutory appeals, the speed with which it
20 addresses them, I don't know if we have a practical
21 problem here. But if we do, Mr. Livingston is in here
22 seeking some sanctions, we've got two problems. One

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1 is I previously ruled on, have the authority of the
2 grand sanctions. Mr. Livingston and I have been
3 through that.

4 MR. LIVINGSTON: I will not seek sanctions
5 next week. Let's go through the week and see where we
6 are.

7 JUDGE NELSON: It was Mr. Norton, I meant.
8 I believe we're talking about a problem that's more
9 academic than real.

10 MR. LIVINGSTON: Now I've got some good
11 news, Your Honor. We've resolved the Carbide dispute
12 so that's now off the table.

13 The only remaining items are on page 10 of
14 the letter.

15 JUDGE NELSON: Whatever happened, Mr.
16 Norton, with my ruling that I didn't have authority to
17 impose sanctions? Did you appeal that one?

18 MR. NORTON: We did, Your Honor.

19 JUDGE NELSON: You got guidance on that?

20 MR. NORTON: The other side did not
21 respond either to your order or to the appeal and we
22 expect a prompt decision, but we don't know what it is

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1 yet.

2 MR. LIVINGSTON: Your Honor, we may not be
3 looking at the same document. Page 10 is just a short
4 listing. Page 10.

5 JUDGE NELSON: I thought you were talking
6 about faxed page 10.

7 MR. LIVINGSTON: On page 10 there's an
8 entry for data for Dow -- has been settled.

9 JUDGE NELSON: I see that.

10 MR. LIVINGSTON: There's two entries for
11 UCC, Union Carbide. Those have been settled. There's
12 an entry for 30 Conrail. That's been settled. That
13 leaves 5, 16, 23 and 40 and 5 and 40 are a pair that
14 raise the same issue.

15 It may be that given all the education
16 we've had today that I could just ask the other side
17 and Mr. Norton whether they think ten minutes of
18 negotiation would be better than 10 minutes or
19 argument. Do any of you think we should proceed with
20 argument?

21 MR. KILLORY: We've actually, Mr. Norton
22 and I have tried to work it out. We haven't

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1 succeeded, so maybe we should proceed.

2 MR. LIVINGSTON: I don't have a problem.
3 Jerry is responsible for 40.

4 MR. KILLORY: We haven't been able to
5 agree. I think it can be handled in pretty short
6 order.

7 MR. LIVINGSTON: So be it.

8 MR. NORTON: Your Honor, interrogatory 5
9 for Conrail which is at Tab 12, the bottom of the
10 page, this was addressed to several railroads.

11 The initial response from Conrail was --

12 JUDGE NELSON: It says it's not
13 applicable.

14 MR. NORTON: That was based on a reading
15 of the language on the bottom of page 6 that the -- in
16 your favor as a condition modified line sales, "in
17 your favor modified line sales" as well as package
18 rights, which I can see was a possible reading. We
19 explained that line sales were the subject of the
20 inquiry. Whether or not they were line sales in your
21 favor and my understanding is that with that
22 clarification.

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1 JUDGE NELSON: Oh, you have a proposal for
2 line sales? The one we just heard?

3 MR. NORTON: Conrail's position is that
4 they still refuse to respond. That's correct.

5 MR. KILLORY: Your Honor, the question can
6 only -- the question puts it for line sales and
7 trackage rights in your favor which is not what we're
8 seeking. If you read what is being sought it could
9 only be that the construction is something in your
10 favor because it seeks, "have you prepared pro forma
11 financials? Have you prepared an operating plan with
12 respect to" -- well, if it isn't a sale in your favor
13 why in the world would you create this?

14 JUDGE NELSON: Why would you want this
15 anyway?

16 MR. NORTON: Well, Your Honor, this
17 relates to their proposal which you've just heard
18 about.

19 JUDGE NELSON: Oh, it gets back to how
20 they value the SP?

21 MR. NORTON: And also the -- what they are
22 doing and what they plan in this regard on their

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1 proposal for possible line sale.

2 Now if they don't have any of these things
3 it's a simple answer to say we don't have them, we
4 haven't done them.

5 JUDGE NELSON: If that proposal is that
6 \$1.5 billion that you've rejected to buy that piece of
7 railroad, haven't we already ordered production?

8 MR. KILLORY: That's not our proposal,
9 Your Honor. It says "in your March 29 filing."
10 That's what you, Your Honor, directed on March 8th to
11 say you better tie this to what these people are
12 asking, actually requesting and so they asked a
13 question. They didn't like the fact that it didn't
14 apply --

15 JUDGE NELSON: I understand that Mr.
16 Killory. I understand that reading. What I'm saying
17 is that even under the SP's reading, I already ordered
18 production.

19 MR. KILLORY: Operating plans?

20 JUDGE NELSON: Of the specific proposal
21 for line sales. Maybe not this proposal. Maybe it
22 was the banker's report that you were seeking. That's

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1 different from the actual proposal.

2 MR. KILLORY: The description of our line
3 sales is in our filing, Your Honor. I don't think
4 we're contesting that we haven't described our line
5 sale proposal which is that there be divestiture.
6 We're not withholding anything as to that. It is when
7 they go on to say if you have got a line sale, give us
8 a pro forma financial for your proposal for
9 divestiture. Clearly, all that tracks to if you have
10 a proposal that says sell it to me.

11 JUDGE NELSON: So you read the question as
12 asking --

13 MR. KILLORY: Do you have a proposal to
14 sell it to Conrail, is that what you're requesting the
15 Board in your March 29 filing. We don't have that and
16 that doesn't apply to us.

17 MR. NORTON: We explained --

18 MR. KILLORY: And they want to change the
19 question having it clear that there can be no other
20 construction. Why would you have an operating plan
21 for something that you're not proposing to be sold to
22 you?

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1 JUDGE NELSON: Let's suppose that we agree
2 that that's the normal, natural reading of the
3 question. What else is it that you want?

4 MR. NORTON: We simply want them to answer
5 whether they have the various documents that are
6 referred to here? If they haven't got them, there's
7 no problem. It's not an issue. If they have the
8 document --

9 JUDGE NELSON: Hypothetically, what did
10 you think they had?

11 MR. NORTON: We don't know whether they
12 have prepared operating plan, for example, how this
13 line would run which bears on --

14 JUDGE NELSON: What line?

15 MR. NORTON: The line sale proposal that
16 they're talking about.

17 MR. KILLORY: We have a divestiture
18 proposal, Your Honor. A line sale to us.

19 MR. NORTON: It's a sale to someone.

20 JUDGE NELSON: Is that this offer, this
21 so-called offer?

22 MR. NORTON: No, they have proposed to the

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1 Board that the Board order that if they approve the
2 merger that part of the current SP line has to be
3 divested. They don't say that it has to be diverted
4 to Conrail, but a fair inference is that Conrail would
5 regard itself as one of the prime bidders for that, on
6 that sale.

7 MR. KILLORY: How does that make any of
8 this relevant to the STB's considerations that we
9 might, if the Board orders divestiture, later on at
10 that event?

11 JUDGE NELSON: Maybe I ought to see the
12 filing?

13 MR. KILLORY: Sure.

14 MR. LIVINGSTON: Your Honor, may I be
15 excused for about a minute?

16 JUDGE NELSON: Sure. I still got Mr.
17 Estes' stuff here. Is he coming back?

18 MR. LIVINGSTON: I doubt it.

19 JUDGE NELSON: He may need these.

20 MR. HUT: Your Honor, if I can approach.

21 JUDGE NELSON: Can somebody get him? Does
22 anybody see him or work with him at all?

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1 MR. BERCOVICI: No. He works in Virginia.

2 I don't know.

3 MR. LUBEL: I'll get them to him, Your
4 Honor.

5 JUDGE NELSON: Yes. He may have gone on
6 low budget and need every copy.

7 (Pause.)

8 MR. HUT: Conrail's position begins at
9 page 7, the important point that Mr. Killory is
10 emphasizing is at page 9 which underscores that we are
11 not seeking divestiture of lines in favor of Conrail.

12 MR. NORTON: That is again not the point.
13 Now that the question has been clarified.

14 JUDGE NELSON: All right, so Conrail says
15 order the merged company to divest the following lines
16 and put them up for bids, an auction type process and
17 what the applicants want to know, I suppose, is what
18 plans you have, if any, on the Conrail side to bid to
19 one of these pieces. Is that it?

20 MR. NORTON: That would be part of it, but

21 --

22 JUDGE NELSON: You've drawn up a plan as

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1 to how to operate such a --

2 MR. KILLORY: Your Honor, it's sort of a
3 free willing nature to reform here. In 77 questions
4 they had an opportunity to ask the questions they
5 wanted and they sure as hell exhausted it.

6 MR. NORTON: For example, whether they
7 conducted a market analysis related to this. It all
8 bears on whether their proposal is one that ought to
9 be considered and how it ought to be considered by the
10 Board and it's puzzling to me that they are resisting
11 this interrogatory which simply calls for them to say
12 whether they have these documents. If they don't
13 exist, it's a nonproblem.

14 JUDGE NELSON: I'm going to deny this
15 request.

16 MR. KILLORY: No. 40 goes with it, the
17 document requested.

18 JUDGE NELSON: First on the ground that
19 the natural reading of the question was the way
20 Conrail read it, namely, with reference to either line
21 sales or trackage rights in its favor and there aren't
22 any in the submission.

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1 Secondly, alternatively, it seems to me to
2 open a wholesale collateral inquiry into something
3 that happens only if, as and when the Commission
4 adopts the divestiture condition and opens up the
5 bidding process and it would seem to me that it could
6 be machinery or proceedings or explorations at that
7 time of that phase of things. That is not what is now
8 immediately before the Board, the details of what
9 would happen in the hypothetical bidding process, so
10 I'm denying it on that ground as well.

11 What's next?

12 MR. LIVINGSTON: Your Honor, we have two
13 left. One is Tab 13, it's interrogatory, yes, it's an
14 interrogatory, No. 16. And it talks about
15 descriptions or understandings entered into between
16 Conrail and Phillips Petroleum relating to rail
17 transportation.

18 JUDGE NELSON: Where is this one? I'm not
19 finding it.

20 MR. LIVINGSTON: Tab 13.

21 JUDGE NELSON: Tab 13.

22 MR. LIVINGSTON: Interrogatory 16.

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1 JUDGE NELSON: Okay, tell me about that
2 one.

3 MR. LIVINGSTON: This is the kind of issue
4 that has come up before. It's our understanding or we
5 have heard that there may be an agreement between
6 Phillips and Conrail in which there are promises of
7 mergers, support in exchange for something. That's
8 what we're trying to find out. I object to this
9 interrogatory on the grounds that they would have to
10 search hundreds of marketing files and hundreds of
11 revenue accounting files and blah, blah, blah.

12 JUDGE NELSON: What does that filing say
13 about Phillips?

14 MR. KILLORY: Nothing, Your Honor.

15 MR. LIVINGSTON: I don't think it mentions
16 Phillips.

17 MR. KILLORY: Not a thing.

18 MR. LIVINGSTON: Phillips is a large
19 company and an important shipper and they talk about
20 kinds of commodities that Phillips ships.

21 In any event, their objection was that
22 this was very burdensome. They have too many

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